

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



ORIGINAL

76-7281

United States Court of Appeals  
FOR THE SECOND CIRCUIT

PRESCRIPTION PLAN SERVICE CORPORATION,  
*Plaintiff-Appellant,*

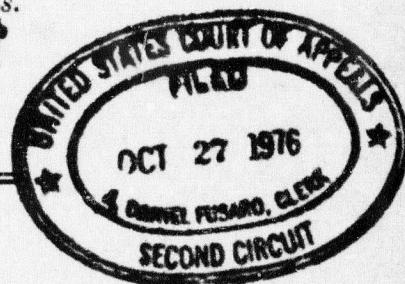
—against—

ALBERT FRANCO, individually and as Administrator, SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC, F. K. RILEY, JR., RICK MILLER, E. MARCUS, JAMES J. MARTIN, W. I. RISTINE, PETER BOCKER, E. G. DENYS, ANDREW RICH and KENNETH W. GUNDLING, individually and as Trustees of the NMU PENSION & WELFARE PLAN,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES  
FRANCO, HICKEY, RILEY, MARCUS,  
RISTINE, DENYS AND GUNDLING



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 76-7281

PREScription PLAN SERVICE CORPORATION,

Plaintiff-Appellant,

-against-

ALBERT FRANCO, individually and as Administrator,  
SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC,  
F.K. RILEY, Jr., RICK MILLER, E. MARCUS, JAMES J.  
MARTIN, W.I. RISTINE, PETER BOCKER, E.G. DENYS,  
ANDREW RICH and KENNETH W. GUNDLING, individually  
and as Trustees of the NMU PENSION & WELFARE PLAN,

Defendants-Appellees.

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On Appeal From the United States District Court  
For The Southern District of New York

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BRIEF OF DEFENDANTS-APPELLEES  
FRANCO, HICKEY, RILEY, MARCUS,  
RISTINE, DENYS AND GUNDLING

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STATEMENT OF ISSUES

1. Do plaintiff's claims of fraudulent inducement to enter into contractual relations and breach of contract "arise under the laws of the United States", within the meaning of 28 U.S.C. §1331, where the federal statutes relied

upon by plaintiff do not seek to regulate the conduct which plaintiff attributes to defendants, do not give plaintiff standing to assert claims thereunder and do not afford the relief sought by plaintiff?

2. Can federal diversity jurisdiction exist under 28 U.S.C. §1332 in a suit by a New York corporation against the Administrator and the Trustees of a New York-based pension and welfare plan where the Administrator and two of the Trustees are citizens of New York and where New York law mandates that a suit to recover trust funds may only be brought against the Trustees?

3. Where defendants are being sued both individually and representatively (as Administrator and Trustees of a pension and welfare plan), can a federal district court exercise personal jurisdiction over non-resident former Trustees in any capacity, or over non-resident current Trustees and the resident Administrator in their individual capacities, where none of the defendants were personally served with a copy of the summons and complaint and where plaintiff has failed to allege, or otherwise demonstrate, a basis for the exercise of long-arm jurisdiction over the non-resident defendants?

STATEMENT OF THE CASE

Plaintiff-Appellant Prescription Plan Service

Corporation ("PPS") has appealed from an Order of the United States District Court for the Southern District of New York (Goettel, J.), filed June 16, 1976 (86a-98a),\* granting the motion of Defendants-Appellees ("defendants") to dismiss the complaint for lack of federal subject matter jurisdiction and denying PPS's cross-motion to "drop" three non-diverse defendants and amend the caption accordingly.

PPS brought this action against the Administrator (Albert Franco), ten of the twelve current Trustees, and two former Trustees (Edmond Marcus and Edward G. Denys)\*\* of the NMU Pension and Welfare Plan ("the Plan"),\*\*\* both individually and in their official capacities as Administrator and Trustees, respectively. PPS, which sought money damages in

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\* Unless otherwise stated, all figures in parentheses refer to pages of the Joint Appendix.

\*\* Defendants Marcus and Denys terminated their service as Trustees as of October 1, 1974 and May 1, 1975, respectively (Franco affidavit ¶3, 16a; Marcus affidavit ¶1, 60a; Denys affidavit ¶1, 80a).

\*\*\* The Plan is a pension and welfare fund, established in accordance with Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c), jointly administered by six representatives of the National Maritime Union ("Union") and six representatives of employers of Union members. The Plan was established by Agreement and Declaration of Trust, dated August 1, 1950, which provided, in substance and among other things, that the Agreement and Declaration of Trust was to be interpreted and governed in accordance with the laws of the State of New York and that the place of business of the Plan was to be New York, New York. (At the present time, the Plan's offices are located at 346 West 17th Street, New York, New York.) (Franco affidavit ¶2, 15a-16a)

the amount of \$323,896.00, alleged that the defendants fraudulently induced it to enter into contractual relations whereby PPS was to administer and service a pharmaceutical prescription benefit program for all eligible beneficiaries of the Plan and that defendants breached the last of three such agreements. (Complaint, 3a-9a)

The complaint alleged federal subject matter jurisdiction under 28 U.S.C. §1331, claiming that the matter in controversy arose under Section 302(e) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(e), and the Welfare and Pension Plan Disclosure Act of 1958, 29 U.S.C. §301 et seq. The complaint also alleged diversity jurisdiction under 28 U.S.C. §1332. (Complaint ¶THIRD, 4a)

The court below found that there was no federal question jurisdiction since the federal statutes relied upon by PPS do not seek to regulate the conduct which PPS attributes to defendants, do not give PPS standing to assert claims thereunder and do not afford the relief sought by PPS. The court below also found that, since PPS and three of the defendants (the Administrator and two of the current Trustees) were citizens of the same state (New York), there was no diversity jurisdiction and that two of these defendants (the Trustees) were indispensable parties to the litigation, thus precluding PPS's attempt to "drop" these non-diverse

defendants from the action.\*

The court below also rejected PPS's self-described "fall back position", set forth for the first time in a letter to the court (Appellant's Brief at 20, Record on Appeal at 20a) after the oral argument on the motion, whereby PPS proposed to "drop" the three non-diverse defendants, to "drop" all of the defendants in their representative capacities, to withdraw its second cause of action (breach of contract) and to continue the action against the remaining (non-resident) defendants in their individual capacities with respect to the first cause of action (fraudulent inducement to enter into contractual relations). The court found that this "fall back position" failed to cure the jurisdictional defects of the complaint because the defendants had not been properly served with process, the complaint was barren of any allegations

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\* In its papers in support of its cross-motion to "drop" the non-diverse defendants, PPS "elect[ed] to regard service as not having been made on any of the defendants" (Horowitz affirmation ¶8, 73a), requested that the summons and complaint "be deemed as yet unserved" (Horowitz affirmation, 75a) and promised to "proceed in due course to effectuate service of the summons and complaint" (Horowitz affirmation, 76a). This admission by PPS that it failed to effect proper service on any of the defendants should, in itself, be dispositive of this appeal. Absent valid service of process, the District Court could not have acquired personal jurisdiction over the defendants. This alone required dismissal of the complaint for lack of personal jurisdiction. Similarly, since the District Court lacked personal jurisdiction over the defendants, there was no basis upon which it could have entertained PPS's cross-motion to amend the caption. Thus, PPS's cross-motion was properly denied. If PPS wished to change the caption and effect proper service of its complaint, then it should have discontinued the action and served a new complaint without burdening this Court with this appeal.

whatever concerning actions of any individual defendant, and the defendants' alleged involvement in the acts complained of was in their representative capacities as Trustees and such involvement did not give rise to personal jurisdiction over the defendants as individuals.

Since the court below granted defendants' motion to dismiss the complaint for lack of federal subject matter jurisdiction, it specifically did not rule on the alternate grounds for dismissal raised by defendants' motion, namely, that the court lacked personal jurisdiction over the non-resident former Trustees; that the court lacked personal jurisdiction over the non-resident current Trustees in their individual capacities; and that PPS failed to effect service of process over the non-resident former Trustees, or over any of the remaining defendants in their individual capacities.

#### STATEMENT OF FACTS

In or about 1970, the Plan began to investigate the feasibility of providing for its beneficiaries a pharmaceutical prescription benefit program which would enable them to obtain prescription drugs upon payment of a small "deductible" fee. Upon learning of the Plan's interest in setting up such a program, PPS presented the Plan with a proposal for administering and servicing such a program. After engaging in negotiations, PPS and the Plan entered into an agreement dated

December 22, 1972 (29a-36a) pursuant to which PPS was to administer and service a pharmaceutical prescription benefit program for the Plan's beneficiaries. (Franco affidavit ¶5, 17a)

This agreement, which by its terms became effective as of March 1, 1973, was later superseded by a similar agreement between PPS and the Plan dated January 29, 1974 (37a-44a). The latter agreement, which by its terms was to remain in effect for one year from January 1, 1974, was extended until June 30, 1975 in accordance with the terms of a third agreement between PPS and the Plan dated January 11, 1975 (45a-47a). Each of these agreements provided, in substance and among other things, that PPS was to receive: specified payments to cover the costs of mailing and other related charges; service fees for processing and rejecting claims; and reimbursement for the specified permissible costs incurred for direct payments to participants and participating pharmacies. The first and second agreements also provided that they were terminable on 60 days' written notice after the first anniversary date. (Franco affidavit ¶¶6-8, 18a-20a)

The third and last agreement -- the subject of PPS's second cause of action (breach of contract) -- provided, in substance and among other things, that: (a) PPS was to receive a semi-annual enrollment fee of 25 cents per eligible member to cover the costs of mailing and other related

charges (Agreement ¶3, 46a); (b) PPS was to receive a guaranteed minimum service fee in the amount of \$36,948 for processing or rejecting claims (\$1.50 x number of eligible participants on January 1, 1975) if the service fees otherwise payable by the Plan for individual claims and rejections actually processed did not total a greater sum during the six month term of the agreement (Agreement ¶2, 46a); (c) the agreement would automatically expire on June 30, 1975 unless the Plan gave PPS 60 days' written notice that it wished to renew the agreement (Agreement ¶4, 46a); (d) either party to the agreement had the right to terminate the agreement at any time upon 60 days' written notice to the other party (Agreement ¶5, 47a); and (e) in the event that PPS continued to receive prescription billings from participants or participating druggists after termination of the agreement, PPS would receive service fees for processing prescriptions filled after termination of the agreement at the rate of \$1.00 per prescription (Agreement ¶5, 47a).

At no time did the Plan give PPS any notice that it wished to renew the agreement dated January 11, 1975. In fact, having found that PPS's performance had been generally unsatisfactory and had become progressively worse during the period of the three agreements, the Plan decided to terminate its contractual relations with PPS. Accordingly, in or about April 1975, the Plan gave PPS written notice that as of June

30, 1975 it wished to terminate the agreement then in effect between PPS and the Plan. After July 1, 1975, the prescription drug program was self-administered by the Plan on a much more efficient basis than it had been by PPS. (Franco affidavit ¶9, 20a)

PPS thereupon commenced this action, alleging -- nearly three years after its execution of the first agreement -- that defendants fraudulently induced it to enter into contractual relations with the Plan (Complaint, First Cause of Action, 4a-8a), and that defendants breached the January 11, 1975 agreement (Complaint, Second Cause of Action, 8a-9a).

With respect to its first cause of action, PPS alleged that defendants made the following misrepresentations: (a) that, notwithstanding the specific language of the agreements, PPS would be given a bona fide opportunity to continue contractual relations with the Plan indefinitely; (b) that the prescription benefit program would be actively promoted among the Union membership; and (c) that the Union had approximately 11,000 active members and 14,000 retired members (Complaint ¶SEVENTH, 5a). Although PPS did not identify which of the named defendants made these alleged misrepresentations, PPS made the bald, unsupported and inherently incredible assertion that these alleged misrepresentations were part of a "scheme" by defendants to insure that the prescription drug program would be unsuccessful (Complaint ¶SIXTH, 5a) and that defendants culminated this

"scheme" by "wrongfully" terminating the January 11, 1975 agreement (Complaint ¶THIRTEENTH, 7a-8a).

In fact, the Plan gave PPS every reasonable opportunity to continue administering the prescription drug program, but PPS's unsatisfactory performance finally necessitated a termination of contractual relations pursuant to the terms of the applicable agreement. Moreover, the Plan desired to see the drug program succeed and, to that end, it actively promoted the drug program among the Union membership. Finally, PPS's apparent claim that defendants misrepresented the number of beneficiaries under the Plan is belied by PPS's own allegation that the Plan in fact had 24,632 eligible members (Complaint ¶TWELFTH, 7a). (Franco affidavit ¶11, 22a)

PPS's second cause of action is based upon an alleged breach by defendants of the January 11, 1975 agreement. PPS claims that it was entitled to receive one-sixth of the minimum service fee provided therein ( $\$1.50 \times 24,632$  members =  $\$36,948$  for the six month period of the agreement) for any month after the termination of the agreement in which it continued to process prescriptions for Plan members. However, the plain language of the agreement provided that the minimum service fee guarantee was applicable only to the six month period during which the agreement was in effect (Agreement ¶2, 46a). After the termination of the agreement, PPS was to receive a flat service fee of \$1.00 for each prescription.

filled after termination which it processed (Agreement ¶5, 47a). Under PPS's interpretation of the agreement, the Plan would be obligated to pay PPS a service fee of \$6,158 per month even if PPS processed only one filled prescription in any month after the termination of the agreement.

None of the defendants were personally served with copies of the summons and complaint; the only person upon whom service of process was made was a Ned Phillips, Esq. Mr. Phillips was then a member of the law firm of Abraham E. Freedman and neither he nor that firm had ever been designated or authorized to accept service of process upon any of the defendants, except in their official capacities as Administrator or Trustees of the Plan. (Franco affidavit ¶17, 26a; Affidavits of other defendants, 48a-61a and 80a-81a; Phillips affidavit ¶¶2-3, 62a-63a; Phillips reply affidavit ¶2, 78a-79a; Marshal's Return of Service, 10a) The Administrator and two of the current Trustees of the Plan are citizens of New York (Franco affidavit ¶15, 25a; Barisic affidavit ¶2, 48a; Miller affidavit ¶2, 51a). The remaining defendants (eight current Trustees and two former Trustees) are residents and domiciliaries of states other than New York (Affidavits of other defendants, 52a-61a and 80a-81a; Complaint ¶THIRD, 4a).

SUMMARY OF ARGUMENT

1. There is no federal question jurisdiction over PPS's claims since the federal statutes relied upon by PPS do not seek to regulate the conduct attributed by PPS to defendants, do not give PPS standing to assert violations thereof, and do not afford the relief sought by PPS. Nor does federal question jurisdiction over PPS's fraud claim exist under the rubric of "federal common law tort" since Congress has not rendered the acts complained of tortious and there is no policy reason to apply federal, rather than state, law principles in resolving the dispute. The exercise of pendent jurisdiction over PPS's second cause of action (breach of contract) would be inappropriate because the tort claim to which it is allegedly pendent does not present a federal question and because PPS's tort and contract claims do not derive from a common nucleus of operative fact.

2. The Court lacks diversity jurisdiction over PPS's claims because three of the defendants are citizens of the same state as PPS. Since two of these defendants (current Trustees of the Plan) are indispensable parties to the litigation, PPS's attempt to "drop" these defendants in order to manufacture diversity jurisdiction must fail.

3. PPS has failed to obtain personal jurisdiction over the non-resident former Trustees in any capacity or over

the remaining defendants in their individual capacities because: (a) none of the defendants have been personally served with process and (b) PPS has not demonstrated any basis for the exercise of long-arm jurisdiction over the non-resident defendants. Because of these jurisdictional defects, and because the transaction of business by Trustees in their representative capacities does not create personal jurisdiction over the Trustees, PPS's attempt to prosecute only its tort claim against the non-resident defendants in their individual capacities must also fail.

ARGUMENT

POINT I

PPS HAS FAILED TO DEMONSTRATE A  
BASIS FOR FEDERAL QUESTION JURIS-  
DICTION OVER ITS ALLEGED CLAIMS

PPS alleges that the District Court has jurisdiction over the subject matter of its claims pursuant to 28 U.S.C. §1331 because they arise under the laws of the United States, specifically Section 302(e) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §186(e), and the Welfare and Pension Plan Disclosure Act of 1958 ("Disclosure Act"),\* 29 U.S.C. §301 et seq. (Complaint ¶THIRD, 4a). However, as the District Court recognized, the federal statutes cited by PPS are wholly inapposite since the conduct which PPS attributes

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\* Repealed as to conduct and events occurring subsequent to December 31, 1974. 29 U.S.C. §1031.

to defendants is not that which the statutes seek to regulate. Moreover, PPS lacks standing to assert violations of these statutes, and the relief sought by PPS may not be obtained thereunder.

Under 28 U.S.C. §1331\* a plaintiff has the burden of showing that its claim "arises under" the laws of the United States. Jemzura v. Belden, 281 F. Supp. 200, 205 (N.D.N.Y. 1968). See generally 5 C. Wright and A. Miller, Federal Practice and Procedure §1350 at 555-56 (1970). This Court has held that to carry this burden a plaintiff must demonstrate that its claim arises "'directly' under federal law" and "[f]acts must be alleged to show that federal law in the particular case creates a duty or remedy." Russo v. Kirby, 453 F.2d 548, 551 (2d Cir. 1971). See also Baker v. FCH Services, Inc., 376 F. Supp. 1365, 1367-68 (S.D.N.Y. 1974).

Thus, in Lindy v. Lynn, 501 F.2d 1367 (3d Cir. 1974), the court held that "an ordinary contract dispute" does not rise to the level of a federal question under 28 U.S.C. §1331. The court stated:

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\* 28 U.S.C. §1331 provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

"An action arises under the laws of the United States if and only if the complaint seeks a remedy expressly granted by a federal law or if it requires the construction of a federal statute or a distinctive policy of a federal statute requires the application of federal legal principles for its disposition. . . . Here the dispute between the parties is purely one as to the correct interpretation and effect of certain contractual documents, an ordinary contract dispute to be determined by the application of the principles of [state] contract law."

Id. at 1369

Measured against the standard imposed by these cases, PPS has utterly failed to meet its burden of demonstrating federal question jurisdiction since its claims manifestly do not "arise under" the LMRA or the Disclosure Act.

#### Labor-Management Relations Act

The LMRA was enacted by Congress to regulate relations between labor and management and to protect the legitimate rights of employees and employers in order to prevent industrial strife which would be harmful to interstate commerce and inimical to the general welfare. 29 U.S.C. §141(b). Thus, the Congressional declaration of purpose and policy provides, in pertinent part, as follows:

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing

the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

29 U.S.C. §141(b)

One of the methods by which Congress sought "to protect the rights of individual employees" was to render it unlawful for employers to make unauthorized payments to union officials and for such officials to demand such payments from employers (LMRA §302(a) and (b), 29 U.S.C. §186(a) and (b)) and to give federal district courts jurisdiction to restrain such conduct (LMRA §302(e), 29 U.S.C. §186(e)).

Thus, the recognized purpose of Section 302 of the LMRA is to prevent corruption of the collective bargaining process through bribery of employee representatives by employers and extortion of employers by employee representatives. Arroyo v. United States, 359 U.S. 419, 425-26 (1959); Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 425 (1st Cir. 1968); Schwartz v. Associated Musicians of Greater New York, 340 F.2d 228, 233 (2d Cir. 1964); Hodgson v. Chain Service Restaurant, Luncheonette & Soda Fountain Employees Union, 355 F. Supp. 180, 184-85 (S.D.N.Y. 1973); Monroe Lodge No. 770 v. Litton Business Systems, Inc., 334 F. Supp. 310, 314 (W.D. Va. 1971).

As this Court recognized in Haley v. Palatnik, 509 F.2d 1038 (2d Cir. 1975):

"The [Labor-Management Relations] Act . . . principally intended to protect the collective bargaining process by eliminating the corruptive influence of side payments by employers to union representatives, 2 U.S. Code Cong. & Admin. News, 86th Cong., 1st Sess. at 2326-2327 (1959) . . . ."

Id. at 1040

See also Beam v. International Organization of Masters, Mates, and Pilots, 511 F.2d 975, 979 (2d Cir. 1975).

Since the complaint herein is utterly devoid of any allegations of illegal payments by employers to employee representatives or extortion of employers by such representatives in violation of 29 U.S.C. §186(a) and (b), it is clear that PPS's reliance on Section 302 of the LMRA is wholly misplaced. Haley v. Palatnik, supra at 1041 ("What the Act does require for a violation is that an employer or a representative of the employer pay, or agree to pay, a union official, with an intent to influence him in his actions, decisions or duties."); Schwartz v. Associated Musicians of Greater New York, supra at 233 ("There can be no violation and no basis for a claim under [29 U.S.C §186] unless it can be shown that an 'employer' has been charged with the making of illegal payments."); Moses v. Ammond, 162 F. Supp. 866, 874 (S.D.N.Y. 1958) (". . . since no violations of §186(a) or (b) are involved, there is no basis for invoking the powers of

the United States courts. Those powers rest squarely upon the presence of such violations.").

In a desperate attempt to bring otherwise straightforward claims of fraudulent inducement to enter into contractual relations and breach of contract within the scope of Section 302 of the LMRA, PPS has made bald, unsupported allegations that defendants were involved in a "scheme" to divert trust fund monies and apply such monies for improper purposes (Complaint ¶FIFTH, 4a). However, such an allegation is totally irrelevant because Section 302 has no applicability whatsoever to alleged violations of fiduciary duties or standards of prudence in the administration of trust funds, such claims being governed by state law. Haley v. Palatnik, supra at 1040 (". . . conduct constituting no more than a simple breach of fiduciary duty to a §302(c) trust does not come within the prohibition of the Act per se."). As the court in Bowers v. Ulpiano Casal, Inc., supra, aptly stated:

". . . the weight of reason and authority compels a narrow reading of section 302(e). In the first place, its language limits federal courts 'to restrain violations of this section'. These violations, if we read correctly, are violations of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund."

393 F.2d at 424 (emphasis added)

See also Moses v. Ammond, supra at 874. ("To read into this statute . . . a broad bestowal of jurisdiction over all dis-

putes relating to union welfare funds is not consonant with the architecture of the law or with its purpose.").

This Court has recognized the narrow scope of federal question jurisdiction under Section 302 of the LMRA. In Lugo v. Employees Retirement Fund, 529 F.2d 251 (2d Cir. 1976), petition for cert. filed, 44 U.S.L.W. 3686 (U.S. May 25, 1976), this Court specifically discussed the issue of "whether section 302(e) confers jurisdiction 'over all cases pertaining to §302 pension plans,' . . . ." 529 F.2d at 254. After analysis of the relevant case law, including its earlier decisions in Cuff v. Gleason, 515 F.2d 127 (2d Cir. 1975), and Beam v. International Organization of Masters, Mates, and Pilots, supra, this Court identified itself as being among those courts adopting "a narrow view of the scope of section 302(e)." (529 F.2d at 255), citing with approval Bowers v. Ulpiano Casal, Inc., supra.

Even assuming arguendo that PPS has somehow identified a violation of Section 302 of the LMRA, it is clear that PPS is not among those persons who the statute seeks to protect. See 29 U.S.C. §141. Since PPS is not a member of the Union (Franco affidavit ¶14, 24a), it lacks standing to assert a claim under Section 302. Carroll v. Associated Musicians of Greater New York, 316 F.2d 574, 576 (2d Cir. 1963). See also Schwartz v. Associated Musicians of Greater New York, supra at 233.

Moreover, the relief sought by PPS -- money damages -- is not obtainable under Section 302(e) of the LMRA. It is well settled that "by the weight of reason and authority and by the plain language of the statute . . . district court jurisdiction under Section 302(e) is limited to restraining future violations of the statute . . ." Snider v. All State Administrators, Inc., 481 F.2d 387, 390 (5th Cir. 1973), cert. denied, 415 U.S. 957 (1974). See also Arroyo v. United States, supra at 427; Bowers v. Ulpiano Casal, Inc., supra at 424; Morrisey v. Curran, 76 CCH Lab. Cas. ¶10,695 at 18,373 (S.D.N.Y. 1975). Because PPS seeks money damages, rather than an injunction, the proper forum for this action is state court.

#### Welfare and Pension Plan Disclosure Act

PPS also attempts to ground federal question jurisdiction on the Disclosure Act,\* 29 U.S.C. §301 et seq., but the language of the statute, as well as the case law thereunder, clearly demonstrates that PPS's reliance on this statute is completely without basis.

The Disclosure Act was enacted because Congress found that "it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made with respect

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\* Since the Disclosure Act has been repealed as to conduct and events occurring subsequent to December 31, 1974 (see footnote at page 13, supra), it clearly can have no application to PPS's second cause of action, which alleges a breach of contract occurring subsequent to the termination of the January 11, 1975 agreement on June 30, 1975.

to the operation and administration of [employee welfare and pension benefit] plans.' 29 U.S.C. §301(a). Thus, the declared policy of the Disclosure Act is "to protect . . . the interest of participants in employee welfare and pension benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto." 29 U.S.C. §301(b). See Lieberman v. Cook, 343 F. Supp. 558, 561 (W.D. Pa. 1972).

The Disclosure Act does not provide the federal courts with jurisdiction to hear all complaints concerning the operation or administration of an employee pension and welfare plan. Its scope is limited to requiring the disclosure of certain required information to certain persons (29 U.S.C. §§304-307) and, in the absence of an allegation that such information has not been disclosed to such a person, an action will not lie under the Disclosure Act. See Lieberman v. Cook, supra, where the court dismissed a complaint, purportedly brought pursuant to the Disclosure Act, stating:

"We agree with defendant that the purpose of the act is to secure disclosure and reporting with respect to welfare and pension plans and that it was not intended to transfer to the federal courts general jurisdiction over the administration of such plans and adjudication of amounts due various beneficiaries. The general supervision of the administration of the plans remains where it always was, viz: in the state courts of appropriate jurisdiction . . . ."

343 F. Supp. at 561-62  
(emphasis added)

Since the complaint herein contains no allegation whatsoever that defendants have failed to disclose information which they are required to disclose under the Disclosure Act, it is clear that PPS's reliance on this statute is wholly misplaced. See Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), aff'd, 387 F.2d 955 (3d Cir. 1968), where the court in dismissing a complaint alleging a violation of the Disclosure Act, stated:

"The instant complaint does not charge violation of any of the reporting and disclosure requirements nor does it seek to recover the amount provided in §9(b) [29 U.S.C. §308(b)] as damages or penalty for the withholding of the required information; it seeks, instead, court review of the business judgments of the administrators of the Fund and court regulation of the Fund's operations. Such broad regulatory power is not expressly conferred by the Disclosure Act nor may it be implied as reasonably necessary to accomplish the purpose of the Act. The legislative history discloses that the aim of the Act was narrow, that Congress intended to confine it to a disclosure and reporting function."

265 F. Supp. at 350

See also Sanders v. Birthright, 172 F. Supp. 895, 902-03 (S.D. Ind. 1959).

Moreover, PPS lacks standing to assert violations of the Disclosure Act. Section 9(c) of the statute, 29 U.S.C. §308(c), provides that actions thereunder "may be maintained in any court of competent jurisdiction by any participant or beneficiary" of an employee welfare and pen-

sion benefit plan (emphasis added).\* Since PPS is neither a participant\*\* nor a beneficiary\*\*\* of the Plan (Franco affidavit ¶14, 24a), it may not bring an action under the Disclosure Act. See Golden v. Kentile Floors, Inc., 512 F.2d 838, 849-50 (5th Cir. 1975).

Then too, PPS has not requested relief obtainable under the Disclosure Act. Section 9(b) of the statute, 29 U.S.C. §308(b), provides that a district court, in its discretion, may award a participant or beneficiary whose request for information has been improperly denied the amount of \$50 a day from the date of such denial. In addition, Section 9(g) of the statute, 29 U.S.C. §308(g), vests district courts with the power to restrain violations of the statute. Since PPS seeks only money damages for fraudulent inducement to enter into contractual relations and for breach of contract, its reliance on the Disclosure Act as a predicate for federal question jurisdiction is frivolous.

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\* Section 9(f) of the statute, 29 U.S.C. §308(f), also provides that the Secretary of Labor has standing to seek injunctions against violations of the statute.

\*\* "Participant" is defined in the Disclosure Act as: "any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. §302(a)(6).

\*\*\* "Beneficiary" is defined in the Disclosure Act as: "a person designated by a participant or by the terms of an employee welfare or pension benefit plan who is or may become entitled to a benefit thereunder." 29 U.S.C. §302(a)(7).

PPS's First Cause Of Action Is  
Not A "Federal Common Law Tort"

Faced with the overwhelming authority conclusively demonstrating the inapplicability of the LMRA and the Disclosure Act, PPS concedes that its tort and breach of contract claims do not arise under these statutes:

"We assert no identification for ourselves with the classes of interested persons sought to be protected by the statutory scheme, and we agree with our adversaries and with the Court below (89a-92a) that we have no standing to bring a statutory action under section 302 (or under the Welfare & Pension Plan Disclosure Act of 1958; 29 U.S.C. §301, et seq., for that matter)."

(Appellant's Brief at 9-10)

"Neither cause of action is directly statutory but rather, recognizably, are common law tort and contract causes of action respectively."

(Plaintiff's Memorandum submitted to District Court at 3, Record on Appeal at 11)

Instead, plaintiff -- an independent third party who entered into a contract with the Plan -- argues that its fraud claim constitutes a "federal common law tort" under a statute relating to disputes between employers and unions over violations of collective bargaining agreements (Section 301 of the LMRA, 29 U.S.C. §185), and that this Court should ignore precedent and imply a civil damage remedy under a statute relating to the bribery of union representatives by employers (Section 302 of the LMRA, 29 U.S.C. §186).

However, this Court has rejected the existence of a so-called "federal common law tort". Thus, in Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956), the Court found:

"No federal common law of torts exists; when Congress enacts legislation rendering it tortious to do what is already a state common-law tort, a suit based on that legislation is within 28 U.S.C. §1331."

Id. at 502 (emphasis added)

Since, in the instant case, the conduct attributed to defendants by PPS has not been rendered tortious by Congress, under the LMRA or any other federal statute, PPS's alleged fraud claim can not rise to the level of a federal question.

Moreover, this Court has recently looked askance at the notion that the concept of "federal common law" is applicable to disputes arising under Section 302 of the LMRA. Thus, in Lugo v. Employees Retirement Fund, supra, the Court stated:

"Plaintiff argues . . . that the quoted language [of Section 302(c)(5) of the LMRA], coupled with the jurisdictional grant in section 302(e), confers on the federal courts the power to create a federal common law governing the management of pension plans. Cf. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). We have considerable doubt about this proposition."

Id. at 255

This Court's reluctance to apply "federal common law" to garden variety disputes concerning Section 302 trusts comports with the nature and purpose of "federal common law". The concept of "federal common law" is not applicable unless a specific statutory grant of jurisdiction vests a federal court with power to resolve a specific dispute and, for policy reasons, it is determined that federal, rather than state, law principles should be applied. Thus, in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) -- the only case cited by PPS in support of its argument that its first alleged cause of action is a "federal common law tort" -- the Supreme Court held that, since Section 301 of the LMRA conferred upon federal courts jurisdiction over suits for violation of collective bargaining agreements and since the resolution of such disputes should be achieved in accordance with a uniform federal policy, it was appropriate "to fashion federal law where federal rights are concerned." Id. at 457.

Since the dispute here does not involve a collective bargaining agreement, it is clear that Section 301 of the LMRA is inapplicable and PPS's citation to Textile Workers is inapposite. PPS's failure to cite any statute which vests a federal court with jurisdiction over tort claims arising out of contracts between independent third parties and a jointly administered pension and welfare plan

precludes it from arguing that the federal courts may apply "federal common law principles" in deciding such disputes.

Reduced to essentials, PPS's argument is that, whenever Congress enacts legislation relating to a certain area of the law, federal district courts automatically become vested with jurisdiction to hear all disputes remotely related to that area -- even if such disputes do not fall within the scope and purpose of the legislation and are not included within the Congressional grant of jurisdiction. This Court has consistently rejected such an expansive approach to federal question jurisdiction. McFaddin Express, Incorporated v. Adley Corporation, 346 F.2d 424 (2d Cir. 1965), cert. denied, 382 U.S. 1026 (1966); T. B. Harms Company v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964). See also Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961); Trans-Bay Engineers & Builders, Inc. v. Lynn, 396 F. Supp. 265 (D.D.C. 1975).

Moreover, the general application of such a "principle" would open the federal courts to all sorts of lawsuits which are not a matter of legitimate federal concern. For example, under PPS's view of the law, an automobile accident occurring on a federal interstate highway would present a federal question merely because the Federal-Aid Highway Act, 23 U.S.C. §101 et seq., and the Highway Safety Act, 23 U.S.C.

§401 et seq. provide for federal aid in the construction of an interstate highway system in conformity with certain safety standards. Thus, because Congress had legislated in that general area, the "principle" espoused by PPS would require federal courts to hear and decide thousands of automobile accident cases,\* just as in the instant case PPS seeks to have common law fraud and breach of contract claims adjudicated in federal court.

PPS also urges this Court to read into Section 302 of the LMRA -- a statute designed to prevent bribery of union officials by employers -- a civil damage remedy which federal courts have held does not exist. Snider v. All State Administrators, Inc., supra; Arroyo v. United States, supra; Bowers v. Ulpiano Casal, Inc., supra; Morrisey v. Curran, supra. The cases cited by PPS in support of its implied remedy theory (Appellant's Brief at 12) are all clearly distinguishable since the plaintiffs there were among the class of persons intended to be benefited by the particular statutes involved.

Thus, Fitzgerald v. Pan American World Airways, Inc. supra, held that, since the Civil Aeronautics Act outlawed racial

\* A similar contention was rejected in Daye v. Commonwealth of Pennsylvania, 344 F. Supp. 1337, 1349 (E.D. Pa. 1972), ("... neither the Federal-Aid Highway Act nor the Highway Safety Act create an implied cause of action to recover damages for personal injuries sustained as a result of a violation of the standards set forth therein or regulations promulgated thereunder."), aff'd, 483 F.2d 294 (3d Cir. 1973), cert. denied, 416 U.S. 946 (1974).

discrimination in air transit, black persons who were victims of discrimination possessed an actionable civil right under the statute. Weinberger v. New York Stock Exchange, 335 F. Supp. 139 (S.D.N.Y. 1971), held that a private investor possessed a cause of action for damages arising out of the defendant's failure to perform its statutory duties under the Securities Exchange Act. Similarly, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), recognized that a private investor could bring an action for damages under the Securities Exchange Act since that statute had "among its chief purposes . . . 'the protection of investors'." Id. at 432. J.I. Case is also distinguishable on the ground that Section 27 of the Securities Exchange Act specifically grants district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by this title . . ." (emphasis added), while Section 302(e) of the LMRA only authorizes injunctive relief.

Unlike the plaintiffs in Fitzgerald, Weinberger and J.I. Case, PPS is not among the class of persons sought to be protected by the federal statute upon which it relies. The recognized purpose of Section 302 of the LMRA is to protect the rights of union members by proscribing bribery of union representatives by employers. Arroyo v. United States, supra; Haley v. Palatnik, supra; Beam v. International Organization of Masters, Mates, and Pilots, supra;

Bowers v. Ulpiano Casal, Inc., supra; Schwartz v. Associated Musicians of Greater New York, supra; Hodgson v. Chain Service Restaurant, Luncheonette & Soda Fountain Employees Union, supra; Monroe Lodge No. 770 v. Litton Business Systems, Inc., supra. Thus, PPS's reliance thereon is wholly misplaced.

There is No Pendent Jurisdiction Over PPS's Second Cause of Action

PPS makes no pretense that its alleged contract claim is governed by federal law. Instead, it asserts federal jurisdiction on the theory that this claim is pendent to its alleged "federal common law tort" claim (Horowitz affirmation ¶8, 73a; Appellant's Brief at 2). However, since PPS has failed to establish federal question jurisdiction over its alleged tort claim, there is no federal claim to which its admitted non-federal claim can be pendent. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966), where the Supreme Court defined pendent jurisdiction as follows:

"Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'."

Id. at 725

See also McFaddin Express, Incorporated v. Adley Corporation, supra at 427; T. B. Harms Company v. Eliscu, supra at 828-29.

Moreover, PPS's claim of pendent jurisdiction must fail on the additional ground that its tort and contract claims do not "derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, supra at 725. The tort claim alleges that defendants fraudulently induced PPS to enter into contractual relations which commenced in 1972, while the contract claim alleges that defendants breached the last in a series of three contracts after its termination in 1975. Clearly, the facts giving rise to the alleged breach have nothing whatever to do with an alleged fraud occurring nearly three years earlier.

#### POINT II

COMPLETE DIVERSITY OF CITIZENSHIP  
BETWEEN THE PARTIES DOES NOT EXIST  
AND THE NEW YORK TRUSTEES ARE IN-  
DISPENSABLE PARTIES WHO CAN NOT BE  
"DROPPED" TO CREATE SUCH DIVERSITY

In addition to federal question jurisdiction, PPS also invoked federal subject matter jurisdiction under 28 U.S.C. §1332,\* alleging that diversity of citizenship exists

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\* 28 U.S.C. §1332 provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and is between--

(1) citizens of different States"

between PPS and defendants (Complaint ¶THIRD, 4a).\* However, it is clear that 28 U.S.C. §1332 is not applicable here.

It is well settled that a federal district court may not exercise diversity jurisdiction unless there is complete diversity between the parties. Thus, this Court has clearly stated that, for diversity jurisdiction to exist, "[i]t is elementary that all of the plaintiffs must be of citizenship diverse to that of all of the defendants." John Birch Society v. National Broadcasting Co., 377 F.2d 194, 197 (2d Cir. 1967) (emphasis added). See also Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1807); Harrison v. Prather, 404 F.2d 267, 272 (5th Cir. 1968) ("The concept of complete diversity requires that all persons on one side of the controversy be citizens of different states than all persons on the other side.").

In the instant case, plaintiff has alleged that it is a citizen of New York (Complaint ¶THIRD, 4a). The affidavits of defendants Franco, Barisic and Miller demonstrate, and the court below found (93a), that they, too, are citizens

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\* In paragraph THIRD of the complaint, PPS alleges that diversity of citizenship exists "between the New York plaintiff and the defendants who do not reside in the State of New York." An allegation in this form is not sufficient to plead diversity jurisdiction. Thus, Professor Wright has stated: "Where jurisdiction is based on diversity, the complaint should allege the citizenship of each of the parties . . . Nor is it enough to allege that plaintiff is a citizen of state X and that defendant is not a citizen of state X . . .". C. Wright, Federal Courts §69, at 290 (2d ed. 1970). See also Official Form 2 to the Federal Rules of Civil Procedure.

citizens of New York\* (Franco affidavit ¶15, 25a; Barisic affidavit ¶2, 48a; Miller affidavit ¶2, 51a). In addition, the Plan itself is a New York-based pension and welfare fund (Franco affidavit ¶2, 15a-16a). It has been held that, where some (but not all) of the trustees of a pension and welfare plan are citizens of the same state as an opposite party in a litigation, a federal district court lacks diversity jurisdiction. Sanders v. Birthright, 172 F. Supp. 895, 897 (S.D. Ind. 1959).

PPS admits that the presence of defendants Franco, Barisic and Miller defeats the complete diversity of citizenship required by 28 U.S.C. §1332 as a predicate for federal jurisdiction. To overcome this obstacle, PPS cross-moved to "drop" these defendants from the lawsuit. We agreed that defendant Franco, as Administrator of the Plan, is not an

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\* Although PPS implies that defendants' proof that Franco, Barisic and Miller are citizens of New York may have been insufficient (Appellant's Brief at 6), the law is clear that, if a defendant challenges an allegation of diversity jurisdiction, then the burden is on the plaintiff to prove the allegation. Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962); Schuckman v. Rubenstein, 164 F.2d 952, 955 (6th Cir. 1947); see generally McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189-90 (1935). In the instant case, PPS submitted no proof in support of its allegation of diversity jurisdiction other than the conclusory statement that the "reverse side of the civil cover sheet [listing the names and addresses of the defendants], filed with the complaint, was checked against current New Jersey telephone directories and certainly seemed to confirm that they [Franco, Barisic and Miller] were indeed New Jersey domiciliaries." (Horowitz affirmation ¶9, 73a).

indispensable party and we therefore consented to his elimination from the lawsuit. However, defendants Barisic and Miller are Trustees of the Plan and, as such, are necessary and indispensable parties under Rule 19 of the Federal Rules of Civil Procedure.

As the Supreme Court explained in Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), where the parties in question are "necessary" (i.e., "persons to be joined if feasible"), they must also be deemed "indispensable" if the litigation ought not "in equity and good conscience" be allowed to proceed without them.

All of the Trustees of the Plan -- including defendants Barisic and Miller ("New York Trustees") -- are necessary parties since, under New York law,\* a suit to recover

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\* FRCP 17(b) provides that the law of the state in which the district court is held should be applied to determine the capacity to sue or to be sued of an entity other than an individual or a corporation:

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held."

See, e.g., Coverdell v. Mid-South Farm Equipment, 335 F.2d 9 (6th Cir. 1964) (the court relied on Tennessee law in holding that a trust could be sued only through its trustees); Vonce v. Miners Memorial Hospital, 161 F. Supp. 178, 186 (W.D. Va. 1958) (the court relied on Virginia law in holding that the UMW Welfare and Retirement Fund could only be sued through its trustees).

trust funds may only be brought against the trustees, not against the trust as an entity. Kane v. Lewis, 282 App. Div. 529 (3d Dept. 1953); Conway v. Cross, 16 Misc. 2d 451 (Sup. Ct. N.Y. Co. 1958); Local No. 1, Amalgamated Lithographers v. Brown, 152 N.Y.L.J. 66, p. 16, col. 2 (Sup. Ct. N.Y. Co. September 28, 1964); In re Stewart, 160 N.Y.L.J. 86, p. 2, col. 5 (Sup. Ct. N.Y. Co. October 30, 1968). This is not disputed by PPS (Appellant's Brief at 12-13).

Since PPS has sued the Trustees in their representative capacities, it is clear that PPS is seeking to recover trust funds from the Plan. Indeed, PPS admitted that the Trustees themselves can have no personal liability on the alleged breach of contract claim, since the Agreement was entered into by the Plan, not by the Trustees (Plaintiff's Memorandum submitted to District Court at 5, Record on Appeal at 11). (In view of such an admission, it is clear that, at the very least, PPS's second cause of action fails to state a claim against the Trustees in their individual capacities.)

Since PPS seeks to recover funds for which all the Trustees -- including the two New York Trustees -- have responsibility, each Trustee must be deemed an indispensable party. See, e.g., Morrissey v. Curran, 76 CCH Lab. Cas. ¶10,695 (S.D.N.Y. 1975), where the court held that all of the Trustees of the NMU Pension & Welfare Plan were indispensable

parties in an action by union members involving alleged trust violations. "Since the [unjoined] trustees have a material legal interest in the fund which will be inevitably affected by any judgment rendered in this case, they are clearly indispensable parties." Id. at 18,374. See also Caylor v. Cooper, 165 F. 757 (S.D.N.Y. 1908).

See also Kelley v. Queeney, 41 F. Supp. 1015 (W.D. N.Y. 1941), where the court held that all of the voting trustees of the stock of a corporation were indispensable parties in a suit against the corporation and the trustees. Since two of the trustees were citizens of the same state as the plaintiffs, the court found that diversity jurisdiction did not exist and, accordingly, granted defendants' motion to dismiss the complaint.

PPS's reliance on Provident Tradesmens Bank & Trust Co. v. Patterson, supra, for its assertion that the New York Trustees are not indispensable parties is unjustified. In Provident, the Supreme Court held that the owner of an automobile involved in an accident was not an indispensable party in a suit brought by the estate of a deceased victim against the automobile owner's insurance company and the driver's estate to obtain a declaratory judgment that the driver was operating the automobile with the owner's permission. However, unlike the instant case, the joinder

of the party in question (automobile owner) was not required in order to obtain jurisdiction over the fund which would be the source of any recovery (insurance policy). Here, the joinder of the New York Trustees is a prerequisite under New York law before PPS may obtain jurisdiction over the fund which is the real object of its lawsuit (the Plan's assets).

Moreover, in Provident, the Supreme Court stressed that the defendants had never raised the issues of non-joinder and indispensability below (these issues having been raised by the Third Circuit sua sponte) and that in such circumstances a court should be reluctant to overturn a judgment binding on all parties (except the automobile owner) reached after extensive litigation. Id. at 112. Here the issue of indispensability has been raised by defendants at the earliest available opportunity. The parties have not yet even joined issue or engaged in any discovery, let alone conducted a complete trial.

Although the facts and circumstances which were before the Supreme Court in Provident are thus very different from those which are before this Court, the Supreme Court in Provident did enumerate some useful guidelines for determining the question of indispensability. Thus, the Court identified four interests to be examined in making a "pragmatic"

determination with respect to the indispensability of parties: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, inconsistent relief or sole responsibility for a liability he shares with another; (3) the interest of the outsider whose joinder is desirable; and (4) the interest of the courts and the public in complete, consistent and efficient settlement of controversies. Id. at 109-11.

An examination of these criteria, in the light of the facts and circumstances of the instant case, leads ineluctably to the conclusion that the New York Trustees are indispensable parties.\* First, PPS's interest in a federal forum is non-existent. Assuming arguendo that personal jurisdiction over the non-resident defendants is proper under the New York long-arm statute,\*\* it is clear that

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\* PPS accused the court below of failing to recognize that the standards to be applied in determining the indispensability of a party under Rule 19 are discretionary (Appellant's Brief at 8). However, the District Court clearly recognized the flexible nature of Rule 19, as evidenced by the Court's lengthy analysis of Rule 19's application to the facts of this case (93a-98a). The portion of the District Court's opinion quoted by PPS as support for its criticism of the District Court does not relate to the issue of indispensability at all, but rather to PPS's argument that federal question jurisdiction exists over its fraud claim as a "federal common law tort". It was with respect to this latter argument that the District Court correctly held that "the basic requirement of federal jurisdiction is that it be premised on either constitutional or statutory grounds, both of which are lacking here." (92a).

\*\* See Point III, infra, for a discussion of the applicability of the New York long-arm statute in the instant case.

affirmance of the District Court's dismissal of the complaint will not result in PPS being without a forum, since PPS would then have the option of refiling the action in state court. Conversely, if PPS were allowed to proceed in the District Court after "dropping" the New York Trustees, then it might also seek to initiate a similar suit in state court against these two Trustees, thus resulting in the multiple litigation, with the attendant risk of inconsistent relief, which the Supreme Court urges should be avoided. Even if PPS did not commence a separate state court suit, the maintenance of this action in federal court would be prejudicial to the interests of the New York Trustees in protecting the Plan's assets, since an adverse judgment could result from an action in which they had no opportunity to participate.

Finally, the other cases cited by PPS (see letter appended to Appellant's Brief) to support its claim that the New York Trustees are not indispensable parties are all clearly distinguishable.

Thus, in Soar v. National Football League Players' Association, 65 F.R.D. 731 (D.C.R.I. 1975), the court merely held that a retirement board, which was a creature of, and did not represent any interest distinct from, the parties before the court, was not an indispensable party. It should be emphasized that in Soar the single trustee of the pension

plan at issue was already a party to the litigation. In Gediman v. Anheuser-Busch, Inc., 193 F. Supp. 72 (E.D.N.Y. 1961), a suit to recover the amount allegedly due to a former employee under the defendant employer's pension plan, the court held that the joinder of the trustee of the plan was not required where both the trustee and the defendant corporation had previously admitted that the scope of the trustee's authority did not extend to the issue before the court (so that an action against the defendant employer alone was therefore appropriate), and where the defendant had not moved to dismiss the action prior to trial.

The two state court cases cited by PPS are wholly inapposite, since, as PPS admits, neither deals with the question of indispensability under Federal Rule 19. Moreover, in O'Hayer v. St. Aubin, 44 Misc. 2d 786 (Sup. Ct. Westchester Co. 1964), the court merely determined that certain remainders of a trust were not necessary parties under New York law. However, in O'Hayer all of the trustees were parties to the litigation. Castaways Motel v. Schuyler, 24 N.Y.2d 120 (1969), did not involve a trust or the question of joinder of trustees at all; it merely held that the New York State Power Authority was not a necessary party to a proceeding directing the Commissioner of General Services to make a grant of land under water without a condition requiring release of future claims.

Although Booth v. Security Mutual Life Insurance Co., 155 F. Supp. 755 (D.N.J. 1957), held that all trustees of a union trust fund were not indispensable parties in an action by union members alleging breach of trust and diversion of trust funds, the Booth court specifically noted that the plaintiffs there were apparently unable to sue all the trustees in a single forum, a problem which would not face PPS in the instant case (see discussion at pages 38-39, supra).

Thus, PPS's attempt to manufacture diversity jurisdiction by "dropping" defendants Barisic and Miller must be rejected since all of the Trustees of the Plan are necessary and indispensable parties to this action. To overcome this obstacle, PPS has set forth a "fall back position" whereby it proposes to "drop" the three New York defendants, "drop" all of the defendants in their representative capacity, withdraw its second cause of action (breach of contract) and continue the action against the remaining non-resident defendants in their individual capacities with respect to its first cause of action (fraudulent inducement to enter into contractual relations). While such a procedure might solve PPS's problems with respect to lack of diversity jurisdiction, the remaining portion of its complaint would still be subject to dismissal for lack of personal jurisdiction over the non-resident defendants in their individual capacities (see Point III, infra).

POINT III

THE COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANTS

Even assuming arguendo that this Court were to identify a basis of subject matter jurisdiction, the decision below should still be affirmed because the District Court lacked personal jurisdiction over the defendants.\* PPS utterly failed to demonstrate a basis for the exercise of long-arm jurisdiction over the non-resident former Trustees in any capacity or over the non-resident current Trustees in their individual capacities. Moreover, PPS has admittedly failed to effect service of process over any of the defendants in their individual capacities (Horowitz affirmation ¶8, 73a).

It is a fundamental principle of law that a court may not exercise jurisdiction over the person of a defendant unless the plaintiff has demonstrated a basis

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\* PPS's suggestion that defendants may have waived their objections to personal jurisdiction by stipulating to an extension of time to answer or move with respect to the complaint (see Horowitz affirmation ¶¶4 and 7, 71a-72a; Appellant's Brief at 5) is totally without merit. It is well settled that such a stipulation does not result in a waiver of objections to personal jurisdiction. Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir. 1944); Capital City Theatre Corp. v. Warner Bros. Pictures, Inc., 19 F.R.D. 210 (N.D.N.Y. 1956); 5 C. Wright & A. Miller, Federal Practice and Procedure §1349 at 540 (1969).

for such jurisdiction. Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 92 (2d Cir. 1975) ("It is basic that the burden of proving [personal] jurisdiction is upon the party who asserts it and that he must show by the complaint and supporting affidavits the essential requirements of the jurisdictional statute."); Weller v. Cromwell Oil Company, 504 F.2d 927, 929 (6th Cir. 1974) ("The burden of proof to establish jurisdiction over the individuals was upon the plaintiff."); Unicon Management Corp. v. Koppers Co., Inc., 250 F. Supp. 850, 852 (S.D.N.Y. 1966) ("The burden of pleading and proving [personal] jurisdiction is upon the party asserting its existence.").

It is equally fundamental that due process requires that a defendant be properly served with a copy of the summons and complaint before he can be subjected to the jurisdiction of the court. See, e.g., Fox v. McMorran, 33 App. Div. 2d 978 (4th Dept. 1970), Siskind v. Levy, 13 App. Div. 2d 538 (2d Dept. 1961). See generally Rule 4 of the Federal Rules of Civil Procedure; Sections 308 and 313 of the New York Civil Practice Law and Rules.

If PPS would have the District Court exercise personal jurisdiction over the non-resident defendants, then it is incumbent upon PPS to establish that these defendants had certain minimal contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Nor may conclusory, unsupported allegations as to acts of defendants suffice to demonstrate a basis for personal jurisdiction. See Weller v. Cromwell Oil Company, supra at 931.

However, the only reason offered by PPS as to why the District Court should exercise personal jurisdiction over the non-resident defendants was as follows:

"The fact that the trust, the NMU PENSION & WELFARE PLAN, is headquartered in Manhattan, makes each of the defendants amenable, wherever found, under New York's 'long arm' statute, to the jurisdiction of this Court over their persons."

(Horowitz affirmation ¶7,  
71a-73a)

While the presence of the Plan in New York may be a sufficient nexus to support a finding of long-arm jurisdiction over the current Trustees in their representative capacities, it is incumbent upon PPS to demonstrate an independent basis of long-arm jurisdiction over non-resident defendants Hickey, Riley, Ristine and Gundling in their individual capacities and over the non-resident former Trustees Marcus and Denys in any capacity.\* PPS has

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\* Defendants Marcus and Denys terminated their service as Trustees as of October 1, 1974 and May 1, 1975, respectively (see page 3, n.2, supra). Thus, they were no longer Trustees at the time of the alleged breach of the January 11, 1975 agreement, which is the subject of PPS's second cause of action.

utterly failed to meet this burden.

As the court recognized in Lehigh Valley Industries, Inc. v. Birenbaum, 389 F. Supp. 798, 807 (S.D.N.Y.), aff'd, 527 F.2d 87 (2d Cir. 1975), upon a motion to dismiss for lack of personal jurisdiction a plaintiff bears the burden of making at least a *prima facie* evidentiary showing of the facts required to support a finding of long-arm jurisdiction under CPLR §302. See also Evans v. Eric, 370 F. Supp. 1123, 1127 (S.D.N.Y. 1974); Socialist Workers Party v. Attorney General, 375 F. Supp. 318, 322 (S.D.N.Y. 1974); Rivera v. New Jersey Bell Telephone Co., 340 F. Supp. 660, 661 (E.D.N.Y. 1972); Saratoga Harness Racing Association, Inc. v. Moss, 26 App. Div. 2d 486, 490 (3d Dept. 1966), aff'd, 20 N.Y. 2d 733 (1967).

The court in Lehigh Valley also recognized that an individual's transaction of business in a representative capacity does not create personal jurisdiction over the individual. 389 F. Supp. at 803-04. Thus, even assuming arguendo that PPS were able to demonstrate that the defendants in the instant case had any involvement with regard to the agreements at issue, this would be insufficient to gain personal jurisdiction over the defendants in their individual capacities. Since the contracting party was the Plan, it is clear that any such involvement by the defendants would have been in their representative capacities as Trustees of the Plan.

Unicon Management Corp. v. Koppers Co., Inc.,  
supra, is particularly apposite here. As in the instant case, plaintiff had named several non-resident individuals (employees of the defendant company) as additional defendants in an action alleging tortious conduct relating to a breach of contract. The court granted the motion of these individuals for an order dismissing the complaint for lack of personal jurisdiction, stating:

". . . in the absence of any substantiation whatsoever of plaintiff's allegations of wrongdoing on the part of the individual defendants in their individual capacity, under the circumstances present here the court must hold that the plaintiff has failed to demonstrate to the court that it has personal jurisdiction over the individual defendants and must dismiss the action as to them."

Id. at 853

Since in the instant case PPS has not even made any "allegations of wrongdoing on the part of the individual defendants in their individual capacity", there is no basis for the District Court's exercise of personal jurisdiction over the non-resident defendants.

Moreover, the method of service utilized by PPS was insufficient to confer upon the District Court personal jurisdiction over any of the defendants, except the Administrator and the current Trustees in their official capacities. Since the only person served with process was an attorney designated to accept service on the Administrator

and Trustees in their official capacities only (see discussion at page 11, supra), the service made here could not give the District Court personal jurisdiction over defendants in their individual capacities.

See, e.g., Foster v. McMorran, supra, in which service of process on a state officer being sued individually was held to be insufficient where the summons and complaint were served on a person in defendant's office who had not been designated by defendant to receive service on his behalf. The Appellate Division reversed the lower court's refusal to dismiss the complaint, holding as follows:

"Jurisdiction of an individual defendant is obtained only by personal delivery of the summons to him (CPLR 308) and delivery to some other person does not constitute valid personal service even though the summons thereafter comes into his possession."

Id. at 978

See also Fleckenstein v. Nehrbas, 233 N.Y.S.2d 920 (Sup. Ct. Nassau Co. 1962) and Spencer Kellogg and Sons, Inc. v. Bush, 31 Misc. 2d 70 (Sup. Ct. Cayuga Co. 1961), where it was recognized that a judgment against a partnership can only be enforced against joint partnership property and against the separate property of the partners actually served with process.

Thus, in the instant case, even if PPS were to win a judgment against the Trustees in their representative

capacities, such a judgment could only be satisfied against assets of the Plan, not against assets of the individual Trustees, since none of the Trustees have ever been personally served with copies of the summons and complaint.

Thus, it is clear that PPS's "fall back position", whereby it seeks to prosecute only its first cause of action (fraudulent inducement to enter into contractual relations) against the non-resident defendants is unavailing because none of these defendants has ever been served with process. Thus, any judgment rendered against them would be a nullity.

Moreover, even if PPS were to remedy this jurisdictional defect, it has still utterly failed to demonstrate a basis upon which the District Court may exercise personal jurisdiction over non-residents and non-domiciliaries of New York. Before such jurisdiction can be exercised, it is incumbent upon PPS to demonstrate an independent basis of long-arm jurisdiction over the defendants by making a *prima facie* evidentiary showing of the facts required to support a finding of long-arm jurisdiction under C.P.L.R. §302. Lehigh Valley Industries, Inc. v. Birenbaum, supra; Evans v. Eric, supra; Socialist Workers Party v. Attorney General, supra; Rivera v. New Jersey Bell Telephone Company, supra; Saratoga Harness Racing Association, Inc. v. Moss, supra. PPS has utterly failed to meet this burden.

Then too, even if PPS were able to meet this burden by demonstrating the minimal contacts between the non-resident defendants and New York State necessary for long-arm jurisdiction, it is clear that PPS would not be able to continue this law suit against these defendants in their individual capacities since the transaction of business by a person acting in a representative capacity (as would be the case with respect to dealings between the defendants and PPS herein) does not create personal jurisdiction over the individual. Lehigh Valley Industries, Inc. v. Sirenbaum, supra, 389 F. Supp. at 803-04.

#### CONCLUSION

For the foregoing reasons, the Order of the District Court dismissing the complaint should be affirmed.

Dated: New York, New York  
October 27, 1976

Respectfully submitted,

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within **BELIEF** Service of a copy of the  
Date: **10-27-76** is hereby admitted  
PHILLIPS & CUMMINGS, P.C.

Clerk's Office received 10/27/76  
William J. Brown  
Attorney for Plaintiff  
at 10 P.M.